Technical claims brief

Monthly update – September 2010

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News

UK Government proposes reform of Conditional Fee Agreements

Following on from Lord Justice Jackson's review of litigation funding published in January this year, the UK government has issued a Written Ministerial Statement. The statement announces a consultation to be carried out in the autumn focusing on Conditional Fee Agreement (CFA) reform.

Lord Jackson's review recognised the contribution of CFAs to providing access to justice but also pointed out their role in increasing the cost of litigation particularly in medical negligence and defamation cases.

The new consultation will seek responses to the proposed abolition of success fees and ATE (After the Event) Insurance premiums payable by the defendant. Under Lord Jackson's proposals CFAs would continue but with claimants meeting the cost compensated by a 10% increase in general damages and one way costs shifting. The consultation will also seek views on Damages-Based Agreements and other contingency fee arrangements.

The Civil Justice Council will also be consulting on a voluntary code of conduct for third party funders (where parties not directly involved in the proceedings fund litigation in return for a share of the damages).

Comment: Although the reforms proposed by Lord Jackson have significant judicial support measures such as the abolition of success fees and ATE insurance premiums will require primary legislation and so parliamentary support is crucial to implementation.

The Written Ministerial Statement is an indication that the government is in favour of change. The high cost of litigation faced by the NHS must be a major concern to them and the reforms should help to reduce this. Other defendants should benefit too but savings achieved through the abolition of success fees and ATEs will be at least partly offset by increased damages and the effects of contingency fees if introduced.

Default retirement age under review

The UK government has issued a consultation paper seeking views on the proposed abolition of the default retirement age of 65. **The Employment Equality (Age) Regulations 2006** currently permit employers to terminate the contracts of employees once they reach the age of 65 regardless of their wishes. Abolition of the regulations is proposed (subject to consultation responses) in October 2011 and would mean that employees could no longer be dismissed at age 65 without the employer being liable to pay some form of compensation.

Responses to the consultation are invited by 21 October 2010.

Comment: With an aging population, greater longevity and a high level of personal debt there is already a trend for people in the UK to work later in life. The abolition of the Employment Equality (Age) Regulations will no doubt strengthen this trend and this is likely to be reflected in increased multipliers for loss of earnings claims.

Irish High Court approves first periodical payment settlement

In the expectation that the Irish Government will shortly introduce a legislative framework for periodical payments, Iarnrod Eireann (Irish Rail) has agreed to pay €160,000 a year to fund the care of a severely brain damaged claimant. The settlement which has been warmly welcomed by the Irish High Court was agreed despite the fact that under current Irish law income tax is payable on periodical payments. Iarnrod have said that they are prepared to enter into an interim arrangement pending anticipated changes in the law.

Comment: A working group set up by the Irish High Court is currently working on proposals for a legislative framework for periodical payments. The absence of periodical payments in the Irish Republic has come under sustained judicial criticism (see April and May briefs) as preventing claimants from having the certainty that funding for care will not run out if they live longer than predicted.

This settlement will no doubt strengthen the campaign for periodical payments in Ireland. If introduced a periodical payment system should help to protect the interests of claimants but is also likely to significantly increase the cost of catastrophic injury claim settlements.

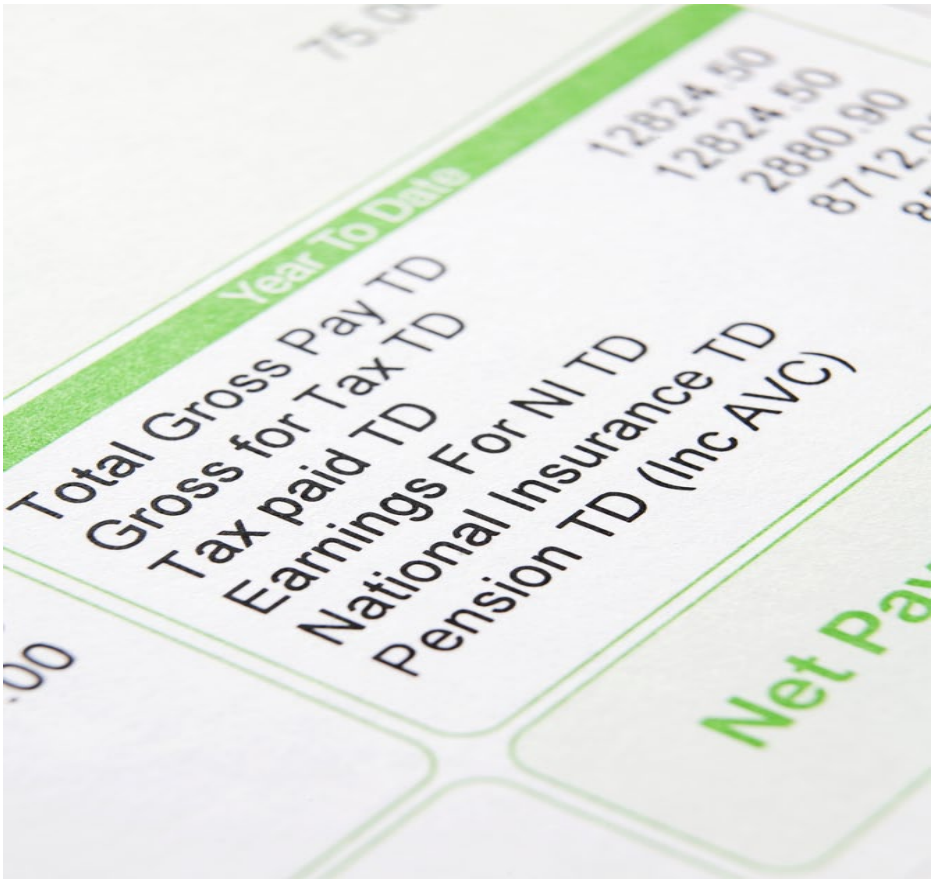
Costs

Lower settlement than amount claimed not proof of exaggeration under civil procedure rules: Morton v Portal Ltd - High Court 2010

The claimant suffered spinal injuries after a fall at work and was rendered paraplegic. Liability was agreed on a 75/25 split basis in the claimant's favour. The claimant originally sought a £1.7m lump sum in respect of loss of earnings, plus periodical payments in respect of care and case management. After prolonged negotiations however the claimant accepted only £385,000 in respect of loss of earnings.

At trial the court was asked to rule (amongst other things) on whether the claimant should be ordered to pay the defendant's costs in respect of the earnings claim or have his own costs substantially reduced because of his gross exaggeration. The claimant admitted that the loss of earnings claim had been worth very much less than he had claimed and that prior to the accident he had misled his accountant and HM Revenue and Customs over his earnings so as to reduce his tax liabilities.

The judge held that there were insufficient grounds for a punitive costs order. The claimant's conduct over his tax liabilities was serious but did not demonstrate that he was someone who was prepared to mislead a court. He had not produced any false documentation in support of his loss of earnings claim and had been willing to enter into meaningful negotiation with the defendants. The fact that he had agreed to settle for much less than he had originally claimed did not amount to "exaggeration" under Civil Procedure Rule 44.3(5) (d). For that to apply there had to have been conduct that could be criticised and overall that was not the case here. The



claimant had been successful in beating the defendant's Part 36 offer on loss of earnings by £10k,000 and the normal costs consequences should apply.

Comment: In the absence of proven and blatant dishonesty to the court, judges appear to remain reluctant to penalise exaggerated claims.

Litigant in person spared costs consequences of Part 36: Kunaka v Barclays Bank PLC – Court of Appeal 2010

The defendant made the claimant a Part 36 offer of £35,000 damages plus costs up to 21 days from the date of the offer. The claimant initially refused the offer but following an e-mail reminder from the defendant several months later finally accepted it.

The defendant had not accepted the offer within the 21 day period specified and the default position under **Civil Procedure Rule 36.10(5)** was that the claimant should pay the defendant's costs from the date of the offer until his eventual acceptance. The claimant disputed that he should pay the defendant's costs and the case was eventually referred to the Court of Appeal to determine the issue.

The claimant in this case was a litigant in person with little knowledge of the law other than what he had picked up during the course of the litigation. The court held that defendant's e-mail, reminding the claimant that the Part 36 offer was still open, was more than a statement of fact and essentially amounted to legal advice. The e-mail did not explain the costs consequences of late acceptance and taking into account the issue of fairness the court used its discretion not to apply the normal costs consequences for the claimant. Instead the defendant was ordered to pay the costs of the claimant up to 21 days from the date of the Part 36 offer with no order for costs thereafter (i.e. each party to bear their own costs from that date).

Comment: There has been some criticism of the Court of Appeal's judgment in this case as being inconsistent with the recent rulings in the joined appeals of Gibbon and Blower (see August brief). In these previous cases a strict interpretation of the Civil Procedure Rules was applied. In this case however the Court of Appeal considered that the fact that the claimant was unrepresented warranted an exception to the normal rule. The Court of Appeal has historically made every effort to ensure that litigants in person are treated fairly and defendants should take great care that correspondence with unrepresented claimants sets out any legal issues clearly and fully.

Liability

Architects prosecuted for low parapet: R v Oxford Architects Partnership – Bristol Crown Court 2010

The Health and Safety Executive has reported that the Oxford Architects Partnership was fined £120,000 with £60,000 costs after pleading guilty to breaching regulations 13 and 14 of the **Construction (Design and Management) Regulations 1994.**

The prosecution arose after a technician fell to his death from a flat roof whilst working on an air conditioning plant. The roof was designed with only a low parapet which failed to prevent the victim from falling from the roof.

Comment: This case serves as a reminder both of the high level of fines which can be imposed in fatal accident cases (the fine would have been much larger but for the guilty plea) and that architects may also be held liable if their designs contribute to an accident.

Fall from height, regulations considered before claimant's conduct: Bhatt v Fontain Motors Ltd – Court of Appeal (2010)

The claimant was injured when he fell from a step ladder whilst attempting to retrieve some car parts from a loft above his employer's car show room. At first instance the court found that the defendants were in breach of a number of sections of the **Work at Height Regulations 2005.** In particular it would have been reasonably practical to store the car parts elsewhere and thereby avoid any need to access the loft in the first place and to provide a fixed drop-down ladder rather than have employees use a step ladder. The exact circumstances of the fall were unclear but the judge at first instance held that the claimant should have waited for someone to foot the ladder for him and there was therefore one third contributory negligence on his part.

> "If an employee falls while working at height when he should not have been required to work at height at all, it is difficult to maintain that he was wholly to blame for the fall on the basis that the fall would not have occurred if he had followed the system prescribed by the employer."
>
> Lord Justice Richards

The defendants appealed arguing that the claimant's conduct was wholly responsible for the accident and that they were not liable. The claimant in using the ladder without someone footing it had ignored his employers' instructions and the established system of work both of which he was familiar with. In the alternative the judge at first instance had been wrong to find that the **Work at Height Regulations** were breached as he had failed to properly consider what was "reasonably practicable" for a small business like the defendants'.

The Court of Appeal dismissed the appeal finding that it was necessary first to consider the regulations rather than the claimant's conduct as these existed to reduce or remove the risk of working at height. The judge at first instance had been right to find that the regulations had been breached and that the breaches exposed the claimant to unacceptable risk. The defendants were primarily liable. The finding of one third contributory negligence was perhaps generous to the claimant but the defendants had not raised this issue in the appeal and it was anyway a finding which the Court of Appeal was reluctant to interfere with.

Comment: Unless an employer is able to show that the removal of a requirement to work from height is disproportionate to the risk involved they are likely to be found in breach of regulation and primarily liable for any subsequent accident.

Local Authority's Occupier's Liability limited to "Normal" use: Harvey v Plymouth City Council – Court of Appeal 2010

The claimant who had been drinking heavily ran across land owned by the defendant whilst running away from a taxi to avoid paying the fare. It was night and the claimant was thought to have tripped over a chain link fence in the dark which had been pulled down to only 14 inches above the ground. After falling over the fence the claimant then fell over a nearby drop in ground level five and a half metres onto a car park suffering a serious brain injury in the process.

The claimant sued the local council who owned the land. The judge at first instance held that the claimant had entered the land, which was regularly used for informal recreation, not with criminal intent but "in youthful high spirits". He was not therefore a trespasser but a visitor for the purposes of the **Occupier's Liability Act 1957**. The council owed the claimant a duty of care under the Act and should have foreseen that the risk of serious injury as the land was frequently used by youths at night. The council had failed to maintain the fence in good order and were held to be primarily liable with 75% contributory negligence on the part of the claimant.

The council appealed arguing that whilst they had effectively permitted people to use the land for informal recreation this did not extend to cover the claimant's reckless behaviour in running across the land in the dark under the influence of alcohol.

The Court of Appeal agreed. The duty of an occupier under the 1957 Act was to make the premises reasonably safe for the use or purpose for which a visitor was invited or permitted. Even if the claimant's actions were foreseeable this was not the correct

test. The test was whether the defendant had given implied consent to the claimant's activities. The council had permitted the use of its land for normal recreational purposes but this did not extend to any activity however reckless. There was no liability under the Act.

Comment: In finding for the defendant the Court of Appeal followed the House of Lords ruling in Tomlinson v Congleton BC where the Lords sought to protect the owners of public recreational facilities from litigation by claimants who had injured themselves through their own recklessness. The ruling in Tomlinson continues to provide important protection for occupiers particularly local authorities.

Procedure

Withdrawal of admission of liability: Gunn and Wilson v Taygroup Ltd - High Court (2010)

The claimants applied to the court to strike out the parts of the defence denying liability on the basis that liability had been conceded pre-action, some two and a half years before proceedings were issued.

The application was refused. The claimants had not established bad faith on the part of the defendants nor had they produced any evidence that they had been prejudiced by the admission and the later denial of liability. The claimants had alleged a loss of £637,000 at the time of the admission but this was now pleaded at £3.4m. It was unfair to hold the defendants to an admission when the claim had grown so much.

Comment: A reminder of the criteria that the court will apply in considering whether to permit a defendant to resile from an admission of liability.

Quantum

Damages awarded for Hospice Care: Drake and Another (as Executrices....) v Foster Wheeler Ltd – High Court (2010)

The claimants were the executrices of the estate of James Wilson who had contracted mesothelioma and died after negligently being exposed to asbestos whilst working for the defendant.

The deceased had suffered a lingering death and for the last 23 days of his life was cared for in St Joseph's hospice. The deceased's family felt morally obliged to make a voluntary donation to the hospice but were unable to do so due to a lack of funds. They subsequently included a claim for a donation towards the hospice's running costs in their action against the defendants.

The defendants argued that this novel claim was not permitted by authority, not covered by any contract between the hospice and the claimants and that the hospice had in essence provided medical care.

> "There is no reasonable basis for distinguishing St Joseph's, a charitable Foundation, from a private individual or from one of Mr Wilson's family members or friends. The services provided were very similar to those provided by such members."
>
> Judge Anthony Thornton QC

The court disagreed. Although the claim was not specifically covered by authority neither was it ruled out and indeed recovery was consistent with established principles. There was no reasonable basis on which to distinguish the care provided by the hospice from gratuitous care provided by a family member. There was no real danger of a flood of such claims as claims for hospice care were inevitably infrequent. The court awarded damages of £10,021 based on 62% of the hospices running costs i.e. the part of the running costs not funded by the NHS.

Comment: Whilst this ruling effectively opens up a new head of damages in fatal claims the financial impact is likely to be limited. A relatively small number of claimants die in hospices.

Confusion over effective date of “Rome II” Regulations: Homawoo v GMF Assurance, Adeline Verbeke and Stephane Pecqueur – High Court (2010)

The claimant was injured in a road traffic accident in France on 29 August 2007. Judgment for liability was entered in favour of the claimant and damages alone remained to be assessed. The court was asked to determine as a preliminary issue where E.U. Regulation 864/2007 (known as “Rome II”) applied to the claim. If it did the claimant’s damages would be calculated in accordance with French rather than English law and would be significantly less. The regulation specifies an “application date” but not an “effective date” for entry into force.

Unsurprisingly the claimant argued that the regulation did not apply to events before 11 January 2009 as that was the application date referred to in article 32 of the regulation and it should therefore be regarded as the date the regulation came into force. In the alternative the claimant argued that the regulation should apply only to proceedings commenced on or after that date.

The defendant argued that the regulation did apply. The regulation applied to any determination by a court conducted on or after 11 January provided it dealt with an incident after the coming into force of the regulation. The regulation was published in the official EU journal on 31 July 2007 and in the absence of a specified date for entry into force it came into force on the 20th day thereafter in accordance with Article 254 (1) of the then European Community Treaty.

The Court was not convinced by either argument. If the application date of 11 January 2009 referred to in the regulation applied to the commencement or determination of legal proceedings this would leave cases where the parties were trying to negotiate settlement without litigation unclear as to whether the regulation applied or not.

The issue would be relevant to a large number of claims and given the need for legal clarity and uniformity the court referred the matter to the European Court of Justice for a ruling.

Comment: European Union regulation is often difficult to interpret and in this case appears to have been further complicated by errors in drafting. The court heard that the original draft did specify an effective date but this was left out of the final version apparently in error.

Completed 25 August 2010 – Written by (and copy judgments and source material available from) John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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